

In the Matter of License No. 5175

Issued to: GUY L. SMITH

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

385

GUY L. SMITH

This matter comes before me by Appellant's motion for reconsideration and mitigation of the Examiner's order dated 21 June, 1949, which revoked Appellant's license as Master but permitted him to obtain a license and serve as Chief Mate on Great Lakes vessels.

NOW UPON FURTHER consideration of said order and the grounds assigned by Appellant, it appears that the order of revocation should be modified and that the interests of equity and justice will be served by the following

ORDER

The Examiner's Order dated 21 June, 1949, is hereby modified to provide for suspension of Appellant's license as Master (No. 5175) for a period of 12 months, commencing 20 December, 1949. The last 6 months of such suspension shall not be made effective, provided no charge is proved against Appellant for offenses cognizable under R.S. 4450 (46 U.S.C. 239) as amended within one year from 20 December, 1949.

As so modified, the Examiner's Order as aforementioned is AFFIRMED.

Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D. C., this 31st day of January, 1950.

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GUY L. SMITH

This appeal comes before me by virtue of Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 21 March, 25 March and 25 April, 1949, Appellant appeared before an Examiner of the United States Coast Guard at Cleveland, Ohio, and later at Indiana Harbor, Indiana, to answer a charge of misconduct supported by two specifications, the first alleging that Appellant, while serving as Master of the SS FRANK ARMSTRONG under the authority of his duly issued License No. 5175, did on or about 2 November, 1948, while on a voyage between Superior, Wisconsin, and Erie, Pennsylvania, between Colchester Light and at a point about ten miles to the east thereof, navigate said vessel in violation of Rule 15 of the laws relating to the navigation of vessels, 33 United States Code 272, in that he failed to navigate the ARMSTRONG at a moderate speed during a period of low visibility, and failed to reduce speed of the ARMSTRONG to bare steerageway and navigate with caution upon hearing the fog signal of another vessel apparently not more than four points from right ahead; the second specification alleging that Appellant, while serving as above, did, on or about 2 November, 1948, while on the same voyage and between the two points mentioned above, violate regulation 322.2 (now regulation 90.2) of the Pilot Rules for the Great Lakes, in that he failed to give the danger signal and reduce the speed of the ARMSTRONG to bare steerageway when the course or intention of the SS JOHN J. BOLAND was not clearly understood.

Appellant was fully informed as to the nature of the proceedings and the possible consequences. Objection was made to both specifications on the grounds that the specifications did not support the charge; were not sufficient to apprise the accused of the time, place and circumstances of the alleged offense so that he could properly prepare his defense; were not specific enough as to time, place and circumstances of the alleged offense to constitute the basis for trial; and finally, that R.S. 4450 did not authorize the trial and proceeding and that if the action was brought by reason of the regulations thereunder, the regulations are too broad to be within the purview of the statute and the regulations are therefore illegal and unconstitutional. Upon motion of the Investigating Officer, the specifications were amended, and as amended were again objected to on the same grounds as above. Upon an overruling of this objection, Appellant pleaded "not guilty" to both specifications. At the conclusion of the hearing, the Examiner found the charge and specification proved and entered an order revoking Appellant's License No. 5175 and all other licenses, documents and certificates which have been issued to him; provided however, on and after

21 December, 1949, Appellant may obtain and operate under a license as first mate, or its equivalent, on the Great Lakes.

The appeal in this case assigns twenty-eight errors on the part of the Examiner and it is further alleged (1) that the conduct of the Examiner was unfair and prejudicial to the accused, (2) that the ARMSTRONG was going at a moderate speed, (3) that the ARMSTRONG was maintaining bare steerageway from 11:55 P.M. until the time of collision, (4) that a danger signal was sounded, (5) that at the time of the collision the ARMSTRONG was stopped or nearly so, (6) that there is nothing in the record to support the finding of misconduct, (7) that the proceedings are quasi-criminal in nature and should be strictly construed, (8) that the Examiner showed bias with respect to certain statements made, (9) that the admission and exclusion of testimony and other matters were prejudicial to the accused, and (10) that the order of revocation is excessive.

### FINDINGS OF FACT

As used herein the symbol "R." refers to the original record; "I.R." refers to that portion of the transcript described by Appellant as the "irregular, illegal" record. (Br. p.4)

On 1 November, 1948, while Appellant was serving as Master and in command of the SS FRANK ARMSTRONG, at 11:20 P.M. said vessel passed Colchester Light in Lake Erie abeam to port, distant 1.3 miles by radar (I.R.9), course 101 degrees true, at full speed (11.9 miles per hour). The visibility at this time was about 1/2 mile because of fog (I.R.14); the ARMSTRONG was blowing the regularly prescribed fog signals for a steam vessel underway on the Great Lakes (I.R.14). The Appellant was on the bridge having come there about 10:25 P.M. that same night (I.R.22). Shortly after leaving Colchester Light, at about 11:33 P.M. (I.R.21), the ARMSTRONG picked up the SS SCHOONMAKER on the radar; the SCHOONMAKER was followed by 4 other vessels (I.R.17). One blast passing signals were exchanged with the SCHOONMAKER (I.R.17), this vessel passing to the north of the ARMSTRONG, having been identified by Appellant by means of radio information exchanges. It was determined by means of the radar that the above mentioned vessels were proceeding in column about one and one-half miles apart on a course of about 283 degrees true, or approximately the reciprocal of the ARMSTRONG's course (I.R.19). A one-blast passing signal was blown to the second vessel at approximately 11:55 P.M. (I.R.23), her fog signal having been heard at approximately 11:50 about 2 points on the port bow of the ARMSTRONG. This signal was heard by both the lookout and the mate; was reported to the mate by the lookout, and in turn was reported personally by the mate to Appellant (I.R.26). At this time, Appellant was standing on the forward side of the bridge at an open window (I.R.27). At 11:45, course of the ARMSTRONG had been altered to 105 degrees true (I.R.33), and then at 11:55 course was gradually altered further to the right to 115 degrees and then continuing over to 125 degrees (I.R.34). From 11:50 P.M. until the time of the collision, the ARMSTRONG blew four or five one-blast passing signals in addition to blowing the regulatory prescribed fog signals (I.R.35). No passing signals were heard from the BOLAND until about 30 seconds prior to the collision at which time there was a two-blast passing signal (I.R.22). There is a conflict of testimony and evidence as to what time the speed of the ARMSTRONG was reduced from "full" to "one-half." The testimony of Van Orman, second mate of the ARMSTRONG, indicates that speed was reduced by the

Appellant at 11:55 P.M. (I.R.24), and such was the entry made in the bridge log. The mate's testimony also indicates that at 12:03 or 12:04 (I.R.37) the vessel was put at full astern and that collision with the BOLAND followed 30 seconds later. However, it is to be noted that the bridge log shows that 12:05 the full astern bell and the collision came together (I.R.37). The mate's testimony shows that in rapid sequence the BOLAND was sighted, a two-blast signal was heard, full astern was rung up on the ARMSTRONG, a danger signal sounded by the ARMSTRONG, and collision occurred (I.R.45). On the other hand, the testimony of the 2nd assistant engineer, Drawe, indicates that the half speed bell, the full astern bell, and collision all followed in rapid sequence, the entire time consumed being about three minutes (R.23). The bell book entries made by Drawe show "Collision - 12:03 A., half ahead then full astern." It may also be noted that the log entries in question were made after the events occurred, the entries in the bridge log being made more than one hour after the collision (I.R.70). The Examiner has seen fit to give more credence to the testimony of the 2nd assistant engineer and found accordingly, that the final half ahead, full astern and collision followed in rapid sequence as a matter of fact.

During the entire period involving the above events the visibility varied from 1/2 mile to 200 feet (I.R.44), the latter distance being the visibility at the time the BOLAND was sighted in the fog. The BOLAND was first sighted bearing 3 points on the port bow, the collision occurring at an angle of four points on the port bow, or about 45 degrees (I.R.37, 38).

At some time prior to the collision, the SS ELWOOD called the ARMSTRONG by radio telephone and informed Appellant that the ELWOOD had passed four ships on the port side and that the ARMSTRONG would be meeting them soon (I.R.76). The ELWOOD, at this time, was about 17 miles (I.R.76) ahead of the ARMSTRONG, proceeding on approximately the same course (I.R.18, 78) and had been identified by means of radar and radiophone communication (I.R.18).

At the risk of tedium, and because the decision of this case is of importance, I propose to discuss (at least briefly), each of the errors which Appellant has assigned. Counsel has submitted a well-prepared memorandum on behalf of Captain Smith, and I consider they are entitled to a full exposition of my views on the several propositions presented.

Assignments of Error Nos. 1 & 2 attack the propriety of the Examiner's Findings that the charge and specifications were proved. I am of the opinion that there is "substantial" evidence in the record to support the findings of the Examiner that the charge and both specifications were proved. More detailed treatment of these general assignments will be found hereinafter. These exceptions are overruled.

Assignment of Error No. 3: Appellant urges that his objections, made at the hearing, to the charges and specifications on the grounds of indefiniteness, failure to support the charge, and illegality, were valid and were not waived by the purported "patching up" of the specifications.

Judicial rules and practice requiring meticulous precision in pleading have no application to proceedings under R.S. 4450, as amended. It is sufficient to charge and particularize the faults and to recite sufficient facts to inform the person charged that an adequate defense may be prepared

and presented. The Supreme Court of the United States pointed out in Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, in discussing the difference between ordinary judicial proceedings and administrative proceedings that differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from history and experience of courts.

It is considered sufficient to state that the amended charge and specifications in this record sufficiently informed the Appellant of the faults alleged against him.

Assignment of Error No. 4 is addressed to the Examiner's action in permitting the case to be "reopened." 46 CFR 137.09-5(d) states as follows:

"The Examiner may, for good cause shown, either on his own motion or on the motion of the Investigating Officer or person charged, continue the hearing from day to day or adjourn such hearing to a later date or to a different place by announcement at the hearing or by other appropriate notice. In making such determination, consistent with the rights of the person charged to a fair and impartial hearing, the Examiner shall give careful consideration to the future availability of witnesses and to the prompt dispatch of the vessel(s)."

Under the above regulation it is considered that the Examiner fully carried out his duty when the hearing was resumed on 25 March, 1949, in Cleveland and then adjourned sine die to a subsequent date to be determined, followed by a conclusion of the hearing at Indiana Harbor, Indiana, on 25 April, 1949.

It is conceded that the record of 21 March, 1949, ends with the words of the Examiner, "The hearing is closed." However, the record clearly shows that such a statement is inconsistent with previous statements made therein. The Examiner had previously reserved decision on the admissibility of the Record of the Proceedings of the Marine Board of Investigation convened to inquire into the collision between the ARMSTRONG and the BOLAND. The Investigating Officer specifically requested that this case be reopened if the "Board isn't acceptable" (R.47). The reservation of decision on admissibility attended by the request of the Investigating Officer clearly implies that the case was to be continued in order to obtain the direct testimony of the witnesses whose previous testimony might be declared inadmissible if the Examiner so held.

No doubt is present in my mind that it was fully contemplated by all parties at the original hearing to call if necessary in person when they were next available, certain material witnesses whose testimony had once been taken, - but which was objectionable to the person charged as an alleged invasion of a constitutional right. Time and effort of all participants might have been conserved by an appropriate stipulation respecting the transcript (or pertinent facts appearing therein) of the former testimony. No such stipulation was arranged, and it does not appear that Appellant contributed anything toward expediting the hearing or accelerating disposition of the case beyond arranging for the desired witnesses to appear at a later date.

Unquestionably the Examiner's selection of words when the original session drew to its end was malapropos. But in view of the known possible effects of his own reservation of decision on the admissibility of the former testimony, I do not believe that the Examiner had any intention to terminate the proceedings on that occasion. I find no error in the Examiner's action in "reopening," "reconvening," "resuming" or "continuing" the hearing on 25 April, 1949, for reception of additional testimony by witnesses appearing in person, following his rejection of the proffered transcript of "former testimony."

Assignment of Error No. 5: Insofar as my own Findings of Fact conflict with Appellant's proposed Findings of Fact Nos. I to XXV, this exception is overruled. I may add that no good reason is known why an Examiner must subordinate his appreciation of the material evidence to the views of the person charged where such opinions are not harmonious with his own.

Assignment of Error No. 6 is addressed to the Examiner's action on Appellant's proposed conclusions I - V inclusive. My comments in connection with Assignment of Error No. 5 apply with equal force to this proposition.

Assignment of Error No. 7: Although counsel for Appellant urge that Appellant was not piloting or navigating the ARMSTRONG until just prior to the collision and, therefore, was not "serving" under his license, I cannot accept the argument that he was therefore not responsible. The evidence clearly shows that Captain Smith was on the bridge from 10:25 P.M., 1 November, 1948, until some time after the collision. In view of this fact and additional evidence showing that he was aware of the potentially dangerous situation, I cannot accept the view that final responsibility for the safe navigation of the vessel did not rest on him, and that he was not serving at the time, under authority of his license. Any other view would be contrary to the traditional concepts of vessel operation and navigation.

Assignment of Error No. 8 criticizes the Examiner's Finding respecting "vicinity" of collision. The record clearly shows that at 11:20 P.M., the ARMSTRONG passed Colchester Reef abeam, distant 1.3 miles while on a course of 101 degrees true (I.R.9). Collision occurred at 12:03 approximately, or about 43 minutes after passing Colchester Reef. This would seem to indicate that the collision did occur in the "vicinity of Colchester Reef."

Assignment of Error No. 9 attacks the basis of the Examiner's Finding that the ARMSTRONG was proceeding at "full speed ahead," etc. It is only necessary for the Examiner in these cases to make his findings based upon due hearing. Beyond this there is no regulatory or statutory requirement that the Examiner quote from or cite any particular portion of the record in support of a particular finding. I cannot concede that, insofar as this finding is concerned, there was any prejudice to the Appellant by the failure of the Examiner to specify the alterations in course. In addition, such failure has been corrected by my findings herein, and the exception is accordingly overruled.

Assignment of Error No. 10 challenges the Examiner's Finding that Appellant was in "active command" of his vessel. The record in this case unequivocally proves that Appellant was on the

bridge of the ARMSTRONG from 10:25 P.M. on 1 November, 1948, until after the collision with the BOLAND. In view of this fact I cannot escape the view that the final responsibility for the safe navigation of the vessel rested upon Captain Smith. (See my consideration of Assignment of Error No. 7.)

Assignment of Error No. 11 relates to the Examiner's Finding respecting visibility at stated times before collision. The evidence is not absolutely clear that fog and low visibility "held" from 8:05 P.M. of 1 November until after the collision, - this not being stated in so many words. However, the record is abundant with evidence that during this period fog signals were being sounded by the ARMSTRONG (I.R. 14 and 15) and other vessels in the vicinity; that the ARMSTRONG was showing a vertical searchlight (I.R. 44); that the visibility was one-half mile at Colchester Reef and 200 feet at the time of the collision; that entries in the log indicate fog throughout this period. The mate (I.R. 44) states, "Sometimes the visibility was a half a mile and then it shut down for a few hundred feet." There appears to be no good reason for considering fog conditions prior to the time Appellant appeared on the bridge at 10:25 P.M. on 1 November. However, the Finding of the Examiner is substantially correct and I consider that the Finding respecting fog conditions prior to 10:25 P.M. is unnecessary but not prejudicial.

Assignment of Error No. 12: I cannot accept the view that this Finding (No. 7, that the ARMSTRONG proceeded at "full speed ahead" from 9:13 P.M. until 12:02 A.M. when she changed to "half speed ahead" followed by "full speed astern" at 12:04 A.M., too late to avoid collision) is contrary to the testimony. There is a conflict of testimony and evidence as to what time the speed of the ARMSTRONG was reduced from "full" to "one-half." This conflict in the testimony of the mate and the 2nd assistant engineer is covered in my Findings of Fact above and it is deemed sufficient to state that, since the Examiner saw and heard the witnesses and has seen fit to give more credence to the testimony of the 2nd assistant engineer respecting the time of a particular sequence of incidents, his conclusions in this respect should not and will not be disturbed.

Assignment of Error No. 13 is critical of the Examiner's appreciation of weather conditions as the situation developed before collision. This contention by Appellant is considered in my discussion of Assignment of Error No. 11. It may have been error for the Examiner to find that weather conditions of haze were getting "progressively worse," however, it is not considered that Appellant has been prejudiced by such Finding since the evidence is clear that the visibility was at times one-half mile and at times shutting in to a few hundred feet. Witness Van Orman stated that the visibility was only 200 feet at the time of the collision.

Assignment of Error No. 14 relates to the Examiner's Finding that the ARMSTRONG heard the fog signal of an unknown and unseen vessel when the record shows the vessel was seen by radar, and to the holding that speed was not reduced at 11:55 P.M. It may be conceded here that "a" vessel was "seen" by the ARMSTRONG's radar, but, there is no evidence in the record to positively show that any one of the vessels seen on the radarscope was the particular vessel from which the fog signal was heard. The evidence does not reveal that a radar bearing was taken in the general direction from which the signal was heard. Even if it be assumed that the Appellant, who was operating the radar himself (I.R. 21), knew that this vessel (later determined to be the BOLAND)

was the one which was sounding the fog signal, Appellant does not improve his position on appeal by such assignment of error as made herein.

In regard to the contention that it was error for the Examiner to hold that speed was not reduced at 11:55 P.M., it is again pointed out that there is conflict in the evidence and the Examiner has seen fit to place more credence in the testimony of the 2nd assistant engineer that the final half ahead, full astern, and collision followed in rapid sequence at about 12:03 A.M. I feel that I am bound at least to the duty placed upon appellate courts to attach to the testimony of witnesses the full weight and quality of credibility which the Examiner gave it. Atlas Beverage Co. v. Minneapolis Brewing Co., 113 F. 2d. 672.

Assignment of Error No. 15: The Examiner has held the ARMSTRONG did not navigate with caution. Appellant contends the charge is not against the ARMSTRONG but against the master. Considering Appellant's latter contention first, it is evident that the Examiner in referring to the ARMSTRONG, fully had in mind the Appellant, Guy L. Smith, in his capacity as master of the ARMSTRONG.

I cannot sustain the Appellant's contention that the ARMSTRONG did navigate with caution. It is this simple issue which is the crux of the proceeding against Captain Smith. Appellant's contention is not sustained by the record, but on the contrary shows that the ARMSTRONG did not navigate with caution and shows that if the vessel had been navigated with caution the collision would not have occurred.

In support of this conclusion it is pointed out that while Appellant was on the bridge he was fully apprised of the navigational situation. Appellant was personally operating the radar and knew that other vessels were in the vicinity of the ARMSTRONG, approaching on approximately reciprocal course. He knew the conditions of low visibility and also knew that the one-blast passing signals of the ARMSTRONG had not been answered by the vessel later determined to be the BOLAND. In addition to information supplied by radar, Appellant was aware of the presence of other vessels from their fog signals. In spite of this knowledge on his part, Appellant allowed the ARMSTRONG to proceed at a telegraph full speed of 11.9 knots, in violation of Great Lakes Rule 15 which states as follows:

"Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms or other causes, go at moderate speed. A steam vessel hearing apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

The mandate contained in this rule that vessels shall go at a moderate speed in thick weather is undoubtedly the first of all safety measures at sea, rivers, bays, sounds and Great Lakes. The ARMSTRONG did not reduce speed and reverse her engines until immediately prior to collision. The danger signal was not blown until the vessels were "in extremis"; the evidence clearly showing that the danger signal was not blown until the BOLAND was sighted through the fog; visibility at



this time being only 200 feet. The attempted avoiding action taken by the Appellant and the blowing of the danger signal were too late to be effective.

I cannot find that the ARMSTRONG was proceeding at a "moderate speed" under the circumstances. In the Rhode Island, 17 F. 554, 557, the court stated:

"The express statutory provision requiring steamers in a fog to go at moderate speed is not an arbitrary enactment, but a statutory recognition and application, in a special case, of the universal rule which requires prudence and caution under circumstances of danger."

In The Manchioneal, 243 F. 801, 805, the court held that a vessel's speed is excessive if she "cannot reverse her engines and come to a standstill before she collides with a vessel she ought to have seen, having regard to fog density."

In the Robert M. Thompson, 244 F. 662, the court said,

"It is, of course, difficult to define moderate speed in all circumstances but it is safe, we think, to define it as something less than top speed or full speed. A vessel that is proceeding as fast as her machinery or her sails will carry her is not going at moderate speed."

It should also be pointed out that it has been held that if the fog is very dense, a vessel's speed, at least in waters where any traffic is to be expected, should not exceed bare steerageway. The Martello, 153 U.S. 64, 70; The Pottsville, 12 F. 631; The Alberta, 23 F. 807; The Sagamore, 247 F. 743, 748; The Ansaldo Savoia, 276 F. 719, 723. There is no doubt that there was "traffic" in the area where this collision occurred, and the ARMSTRONG was not proceeding at bare steerageway.

Since the obligation of a vessel to go at moderate speed is statutory, a vessel violating the rule has the burden of showing that her speed could not have contributed to the collision - a burden which can rarely be sustained. The Pennsylvania, 86 U.S. 125; The H. F. Dimock, 77 F. 226, 229, 230; The Columbian, 91 F. 801; The Providence, 98 F. 133; The Northern Queen, 117 F. 906.

Most of the above discussion has disregarded the fact that the ARMSTRONG had an adequately operating radar in use for some length of time prior to the collision. The record here does not show that any effort was made to take a series of radar ranges and bearings to determine the course and speed of the target vessel. If this had been done, both the mate on watch and the Appellant would have had information which, if used prudently, would have enabled effective timely avoiding action to be taken. Having on board a radar in operating condition is of little value if those on board do not use the valuable navigational information which it can supply. It is acknowledged that total reliance must never be placed on the radar to the exclusion of the rules of the road and the principles of good seamanship. Radar, in and of itself, will not prevent a collision, but subject to certain limitations, it will provide information which will permit the master of a vessel to avoid one. In my opinion a master who fails, refuses or neglects to use such information is not

only negligent but guilty of misconduct.

Assignments of Error Nos. 16 & 17: These two assignments are covered in my discussion of assignments 14 and 15, and further comment is not necessary.

Assignment of Error No. 18 has to do with the Examiner's Finding of distance of SS ELWOOD and the latter's course. This exception is sustained. However, it is not considered that the Appellant was in any way prejudiced by this finding because it was not necessary to support the conclusions and order of the Examiner.

Assignment of Error No. 19 is addressed to the Examiner's Finding re conversation between the ELWOOD and the ARMSTRONG. In regard to this contention, it must be pointed out that the testimony upon which this finding is based was brought out on cross-examination by counsel for the Appellant. It is not considered that Appellant can now be heard to complain about a finding based on this testimony. It should be noted that in the event this testimony had been objected to (which it was not), it would have been nevertheless admissible as an admission.

Assignment of Error No. 20: "The Hearing Examiner erred in his Finding No. 16 in finding generally that the ARMSTRONG saw four vessels approaching in her radarscope rather than in finding the specific person who saw this, whether Guy L. Smith or First Mate Van Orman who was navigating the ARMSTRONG, and further in finding that there was no reduction of speed." In making this finding the Examiner might have been more selective in his choice of words, however, it is considered that the general import of the finding is that Appellant, as Master of the ARMSTRONG, was aware that the radarscope indicated the approach of four vessels. It is believed that the Findings of Fact herein have corrected this deficiency. Discussion of the assignment of error in regard to reduction in speed will be found in my remarks concerning Assignments of Error 14 and 15. This exception is overruled.

Assignment of Error No. 21 contends Appellant's conduct was not "willfull" prior to collision. In considering this contention, it is first pointed out that the subject matter is not to be found in the Examiner's Finding No. 17. From an examination of the record, it is assumed that reference is being made to the Examiner's Findings Nos. 19 and 20.

In connection with this proposition, the following is quoted from 45 Words and Phrases 70 (cumulative pocket part), citing the case of Bellomy v. Bruce, 25 N.E. 2d. 428, 433; 303 Ill. App. 349:

"An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others such as exhibits a conscious indifference to consequences constitute constructive or legal 'willfulness'."

In addition the following definition of "willful" conduct is given in 45 Words and Phrases 272, citing Buck v. Alex, 263 Ill. App. 556:

"An intentional disregard of a duty known, or which should have been known, necessary to another's safety, is 'willful' conduct.

With these definitions in mind it would seem that the Examiner was substantially correct when he found that the conduct of the Appellant was "willful." Appellant, as an experienced master mariner, in navigating his vessel under the circumstances and manner as pointed out previously in this opinion certainly showed an indifference to the consequences of his acts and his known statutory duty, and the conclusion is inescapable that his conduct was "willful."

Assignment of Error No. 22: Appellant urges the Record does not support the Examiner's conclusion that the charge and specification were proved. I find that there is ample evidence to support the conclusion of law made by the Examiner. "Misconduct" in this case rests upon the doing of a wrongful act or alternatively, the failure to perform a duty which the Appellant was obligated to execute in accordance with existing statutes. A determination of this situation will resolve the Appellant's immunity or fault. Appellant's exception as stated is overruled.

Assignment of Error No. 23 is addressed to the comments, expressions of personal views and observations in the Examiner's opinion. The Examiner has remarked upon the wanton and reckless gamble with life and property. Corpus Juris defines:

"Reckless conduct. Conduct such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety of others, although no harm was intended." 53 C.J. 550

and

"Wantonness has been defined variously as action without regard to the rights of others; condition so consciously leading to harmful results that the party charged may be deemed to have intended such results from his dereliction or affirmative action; conscious disregard of probable or natural consequences, but without intention to inflict injury." 67 C.J. 325.

In the light of the above authoritative definitions I find that the conduct of the Appellant was as found by the Examiner. As previously noted, the Appellant was on the bridge of his vessel, fully aware of the dangerous situation, yet in violation of the rules of the road allowed his vessel to proceed at a speed which, as eventualities proved, utterly disregarded the safety of others. Such conduct with his knowledge of the situation was "reckless and wanton."

Anent the Examiner's remarks pointed towards criticism of Rule 322.1 and Rule 23 of the Pilot Rules for the Great Lakes, and in addition his remarks to the effect that there is a "nautical track meet" on the Lakes and that company dispatchers "needle" masters into disobedience of the law, I desire to make it crystal clear that, although conscious of judicial practice to digress from the merits of a case and express opinions on subjects not at issue nor necessary to a decision, I find no such justification for a Coast Guard Examiner to indulge in such practice (legaldicta, quasi-humorous interpolations, etc.) since his function is to discover pertinent facts of the matters before him and enter an order based on such facts. The opinion required by Coast Guard routine

contemplates fidelity in following the record, and deviation therefrom into a field of information foreign to the specific issues to be decided must and will be discouraged. The Appellant's exception in this respect is sustained. Repetition of such practice by Coast Guard Examiners should not recur, and will not be tolerated or sanctioned. The function of an Examiner in these cases is to determine the merits of a valid controversy; not to display his erudition or impede the orderly presentation of facts by any party in interest. Dicta in an administrative proceeding has little merit, and no value.

Assignment of Error No. 24 suggests an abridgment of Appellant's right to cross-examine adverse witnesses. Apparently Appellant is referring to the Record at I.R. 54 where the Examiner ruled "objection sustained," there having been no objection made when counsel for the person charged asked witness Van Orman the following question: "In your opinion, who was to blame for this collision between the ARMSTRONG and the BOLAND?" Attention is directed to 46 C.F.R. 137.09-50 wherein it is provided:

"The examiner may order withdrawn improper questions by the Investigating Officer or by the person charged or his counsel even though not objected to by the adversary party, in order that improper evidence may not be introduced into the record."

In this connection, it may be noted that the law does not look with favor on opinion evidence and the practice of receiving opinions has been subjected to considerable criticism. Exceptions to the rule excluding opinion evidence are not to be made except as they may be required to prevent a failure of justice. 32 C.J.S. 444. It was entirely within the province of the Examiner to interrupt this line of questioning by counsel for the person charged and I find no ground for overruling this action.

In passing, it may be noted that actually the transcript of the record indicates that the Examiner's ruling barely anticipated the Investigating Officer's objection. I.R. 54.

Assignments of Error 25, 26 and 27 are critical of the Examiner's ruling relating to the exclusion and introduction of testimony offered at the hearing. In spite of the general nature of these assignments, I assume that counsel refer to the remarks in the appeal brief, page 42 et seq. under the heading "The Admission and Exclusion of Testimony and Other Matters to the Prejudice of the Accused."

The instances there complained of will be treated in the order of appearance:

- (a) Appellant does not indicate wherein there is cause for complaint, and examination of the Record does not disclose prejudicial error.
- (b) Going beyond the location charged: (I.R. 4 and 5): This testimony may have been in excess but it is not considered that the Appellant was harmed thereby.
- (c) Admitting hearsay (I.R. 7 and 9): It is not considered that the admission of log books as evidence can be successfully challenged when it is considered that the official log book is a document maintained in the regular course of business. The admissibility of log books or authenticated copies finds support in the Act of June

20, 1936 (28 USC 695) which provides in part that:

"\* \* \* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, etc., shall be admissible in evidence \* \* \* if it shall appear that it was made in the regular course of any business, and that it was regular course of business to make such memorandum or records at the time of such act etc., \* \* \*."

It is further provided that:

- "\* \* \* All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility." (underscoring supplied)
- (d) Direction to leave out a change in course (I.R. 12): It is not considered that there was any prejudice to the Appellant by this ruling by the Examiner since subject course change "for a few minutes" is shown on the certified photostatic copy of the ARMSTRONG's course recorder chart which was admitted in evidence as Investigating Officer's Exhibit No. 4.
  - (e) Direction of Examiner to Investigating Officer to tell the Witness what a course recorder does (I.R. 29): Appellant's contention is in error in that the Examiner directed the Investigating Officer to "ask" the witness what a course recorder does.
  - (f) Allowing pictures of the BOLAND to be introduced (I.R. 40): It has been held by the courts that the admission or exclusion of photographs from evidence is within the trial court's sound discretion. Chicago G.W.R. Co. v. Robinson, 101 F. 2d. 994, certiorari denied 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1520. Bearing in mind that this proceeding is administrative and the Examiner is not bound by the strict rules of evidence, it was well within his prerogative to admit subject photographs in evidence.
  - (g) Shutting out testimony of witness on vital issue (I.R. 48): The question directed to the witness would have required an answer concerning his own mental state and such answer could have no bearing on what the Appellant thought concerning the course and intention of the BOLAND.
  - (h) Ruling on objection not made (I.R. 54): This has been treated in my discussion of Assignment of Error No. 24.
  - (i) Unwarranted remark about agreement and refusing to let witness testify to speed after admitting pictures of BOLAND (I.R. 55,56): There appears to be no reason in the record for the remark by the Examiner; however, it cannot be said that the Appellant was unduly prejudiced thereby. Respecting the alleged error in sustaining objection to the question as to whether witness Van Orman could tell about the speed of the BOLAND from the damage to the bow of the ARMSTRONG, it is my considered opinion that such testimony could only be elicited from a witness qualified as an expert in naval construction and collision damage. Witness Van Orman was not qualified as such expert.
  - (j) Striking out testimony (I.R. 59, 60): It is my opinion that the Examiner erred in

- striking out the testimony in question since the witness did see the actions of some person on the BOLAND. However, it was within the province of the Examiner to rule whether or not the evidence was material to the charge against the Appellant.
- (k) Unwarranted remarks (I.R. 63): It may be conceded that the remarks of the Examiner were inopportune, however, the record unequivocally shows that this was ordered stricken from the record by the Examiner at the time
- (l & m) Sustaining objection not made (I.R. 64): My remarks under Assignment of Error No. 24 dispose of this point. It may be noted here that Appellant made no objection at the time.
- (n) Admitting testimony of other times and places (I.R. 72): My remarks under (b) above dispose of this contention.
- (o) Overruling motion to dismiss (I.R. 93): The granting or denying of a motion to dismiss is entirely within the province of the Examiner to be determined by the evidence he has before him in the case. My review of the record herein satisfies me that the Examiner had ample grounds for overruling the motion.

Assignment of Error No. 28: My remarks under "CONCLUSION" infra cover this subject.

Appellant contends this proceeding is "quasi-criminal". It is deemed sufficient to observe that the amendments of 1936 and 1937 (36 Stat. 1167; 49 Stat. 1381; 50 Stat. 544) to R.S. 4450 have so completely and thoroughly changed the characteristics, nature, intent and purposes of the original statute, that instead of being "penal" in nature (Benson v. Bulger, 251 F. 757, aff. 262 F. 929 - 9 CCA 1920), it is now, and has been, considered to be "remedial." This interpretation has been applied by the Secretary of Commerce during his administration of the Act, and by the Commandant of the Coast Guard since that function of the Secretary of Commerce was transferred to this Agency by Executive Order 9083, dated 28 February, 1942; confirmed by Reorganization Plan III, effective 16 July 1946, 60 Stat. 1097.

Correspondingly, cases originating under the same Act (now 46 U.S.C. 239, as amended) have been considered to be within the permissive, but authoritative provisions of the Administrative Procedure Act (5 U.S.C. 1001 et seq.) and fall directly within rules promulgated under the latter Act rather than the rules applicable to civil, criminal or quasi-criminal cases. The published regulations issued by the Secretary of Commerce and the Commandant of the Coast Guard have officially recognized this distinction, and insofar as it has been practicable so to do, have brought proceedings under R.S. 4450, as amended, within the terms and provisions of 5 U.S.C. 1001 et seq.

Thus, while all applicable civil, constitutional rights and privileges of a person or persons involved in such (R.S. 4450) proceedings must be preserved and secured, it should be appreciated that any sanctions available to the Coast Guard in the fulfillment of its mandatory, statutory duty to protect as far as it is possible, the safety of lives and property on vessels of the American Merchant Marine, may, and will be invoked by the standards established for "administrative practice and procedure."

### CONCLUSION

There is substantial evidence to support the charge and specifications in this case. The evidence clearly shows that the Appellant was on the bridge of his vessel, fully cognizant of the dangerous navigational situation developing in which the ARMSTRONG was involved. He had at hand more than sufficient information to cause a prudent master to navigate with caution. In addition to being warned by the master of the ELWOOD that he could expect to meet several vessels proceeding on a course approximately reciprocal to his, Appellant was aware of the pending meeting situation from his own radar while those approaching vessels were still several miles away. In spite of this adequate advance knowledge he allowed his vessel to proceed at full speed in reduced visibility until he found himself in the jaws of collision. Further evidence of the potentially dangerous situation was brought home to Appellant when the ARMSTRONG's passing signal was not answered by the approaching vessel. This should have warned or disposed the Appellant to reduce the speed of his vessel to bare steerageway, if not actually stop. It is true that a course change was made to the right, but the record shows that such alteration was originally only gradual, the larger change being made within approximately eight minutes of the collision. Had this master altered course when he first became aware of the developing situation, and had he slowed his vessel to "moderate speed" under the existing reduced visibility conditions in order to have more time to study the situation, I feel reasonably sure that this collision, with its resulting loss of life, would not have occurred. The danger signal which, if timely used, might have averted collision was not blown until the two vessels were "in extremis."

The Appellant's apparent utter disregard of the statutory responsibility and duty placed upon him as a shipmaster as disclosed by the Record in this case cannot be condoned by the United States Coast Guard in the light of its Congressional mandate to preserve safety of life at sea. In my opinion, the order entered is not too severe in the light of known facts. Appellant had ample time, sea room, and knowledge to have made the collision impossible. He failed to use any of these elements - and disaster occurred.

FINAL ORDER

The order of the Examiner dated 21 June, 1949, should be, and it is, AFFIRMED.

J. F. FARLEY  
Admiral, United States Coast Guard  
Commandant

Dated at Washington, D. C., this 20th day of Dec., 1949.